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SUPREME COURT, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959.

No. 529

SECURITY INSURANCE COMPANY, PHILADELPHIA FIRE AND MARINE INSURANCE COMPANY, THE HOME INSURANCE COMPANY, THE STANDARD FIRE INSURANCE COMPANY, MILWAUKEE MECHANICS' INSURANCE COMPANY,

Petitioners,

vs.

MAX EDLIN AND IDA EDLIN,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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TABLE OF CONTENTS.

	PAGE
Citations to Opinions Below	2
Jurisdiction	2
Questions Presented	2
Statement	3
Reasons for Granting the Writ	5
Conclusion	20
Appendix A—Opinion of the Court of Appeals	21
B—Opinion of the District Court	28

TABLE OF CASES.

Beman v. Springfield Fire & Marine Ins. Co., 303 Ill. App. 554, 25 N. E. 2d 603 ..... 4, 7, 13, 14

Budelman v. American Ins. Co., 297 Ill. 22, 130 N. E. 513 14

Buder v. Becker, 8 Cir. 185 F. 2d 311, 315 17

Daugaard v. Hawkeye Security Ins. Co., 8 Cir., 239 F. 2d 351, 355 17

Dubin Paper Co. v. Insurance Co. of North America, 361 Pa. 68, 63 A. 2d 85 ..... 7, 11

Edlin v. Firemen's Ins. Co., 225 F. 2d 80, cert. den. 350 U. S. 902 4

Edlin v. Security Ins. Co., 160 F. Supp. 487, D. S. S. D. Ill. 4, 6, 10, 13, 15

Erie Ry. Co. v. Tompkins, 304 U. S. 64, 82 L. Ed. 1188, 58 S. Ct. 817 17

First National Bank of Highland Park v. Boston Ins. Co., 17 Ill. App. 2d 159, 149 N. E. 420 ..... 10, 15

First National Bank of Highland Park v. Boston Ins. Co., 17 Ill. 2d 147, 160 N. E. 2d 802 ..... 5, 11, 14

Grundeen v. United States Fidelity & Guaranty Co., 8 Cir., 238 F. 2d 750, 753 16

Heidisch v. Globe & Republic Ins. Co., 368 Pa. 602, 84 A. 2d 566 ..... 7, 11

Homolka v. Gluck, 8 Cir., 248 F. 2d 731, 733, 734 16

Huddleston v. Dwyer, 322 U. S. 232, 88 L. Ed. 1246 18

Illinois Mut. Fire Ins. Co. v. The Andes Ins. Co., 67 Ill. 362 ..... 5, 7, 13

Milhim v. Hawkeye Ins. Co., 171 Ill. App. 262 15

Milwaukee Insurance Co. v. Kogen, 8 Cir., 240 F. 2d 613, 615 16

Milwaukee Mechanics Ins. Co. v. Maples, 37 Ala. App. 74, 66 So. 2d 159, cert. den. 259 Ala. 189, 66 Ia., 173 11

Patterson v. Durand Mut. Fire Ins. Co., 303 Ill. App. 128, 24 N. E. 2d 740 ..... 5, 7, 13

Ramsdell v. Insurance Company of No. America, 197 Wis. 136, 221 N. W. 654 8

Schultz for the Use of Whitlock v. Home Ins. Co., 205 Ill. App. 297. (Abst.) 4, 7, 8, 13

U. S. v. The Peggy, 1 Cranch (U. S.) 103, 110, 2 L. Ed. 49, 51 18

Vandenbark v. Owens-Illinois Glass Co., 311 U. S. 538, 85 L. Ed. 327 ..... 6, 18

MISCELLANEOUS.

Hermann, Equitable Conversion in Illinois, Chicago Bar Record, June, 1959 14

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vs.

MAX EDLIN AND IDA EDLIN,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable Earl Warren, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Petitioners, Security Insurance Company, Philadelphia Fire and Marine Insurance Company, The Home Insurance Company, The Standard Fire Insurance Company, Milwaukee, Mechanics' Insurance Company, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above entitled case on June 4, 1959.

CITATIONS TO OPINIONS BELOW.

The opinion of the District Court (Record, 70) printed in Appendix B hereto, *infra*, page 28, is reported in 160 F. Supp. 487. The opinion of the United States Court of Appeals for the Seventh Circuit printed in Appendix A hereto, *infra*, page 21 is reported in 269 F. 2d 159.

JURISDICTION.

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on June 4, 1959. Rehearing was denied on August 17, 1959. The jurisdiction of this Court is invoked under U. S. Code, Title 28, Section 1254, providing for review of decisions of the United States Courts of Appeal by this Court.

QUESTIONS PRESENTED.

1. May a Court of Appeals reverse the judgment of a District Court and allow insureds to recover on policies of fire insurance even though they have been paid in full for their property by a condemning authority, when the decision of the Court of Appeals decides an important question of state law in a way in conflict with the applicable state decisions.

2. May a Court of Appeals reverse the verdict of a District Court which has made a finding on state law in accordance with the relevant state decisions and held that insureds cannot recover on policies of insurance when they have suffered no loss.

3. May a Court of Appeals in reversing a decision of a District Court rely on a state court decision decided subsequent to that of the District Court, which neither overrules or disapproves of the state precedents upon which the District Court relied.

STATEMENT.

On September 3, 1952, and for a long time prior thereto, Max Edlin and Ida Edlin (hereinafter referred to as "Edlins") were the owners of certain real estate in Peoria, Illinois, and the building and contents located thereon. The building was used as a department store and contained various and assorted merchandise. Fire insurance in the name of the Edlins was maintained on both building and contents.

On September 3, 1952, the Peoria Housing Authority (hereinafter referred to as "Authority"), pursuant to the Illinois law of eminent domain, filed a petition in the County Court of Peoria to condemn the real property, making the Edlins party defendants thereto. Pursuant to Illinois law, the value of the property for purposes of condemnation would be determined as of the date of the filing of the petition and payment to the Edlins of the condemnation award would effect a retroactive vesting of title in the condemning authority to that date.

On November 28, 1952, while the condemnation proceeding was pending, fire destroyed the building and damaged the contents therein. Thereafter, the Edlins instituted separate lawsuits against the contents insurers and the building insurers. The contents insurers denied liability, asserting that the fire had been willfully and maliciously caused by the Edlins for the purpose of obtaining the proceeds of the fire insurance policies. The cause was tried in the United States District Court and judgment was rendered against the insurers on February 12, 1954. This judgment was affirmed in the Court of Appeals for the Seventh Circuit by a divided court, the dissenting judge, Chief Judge Duffy, stating that in his opinion evidence of the motive of arson was improperly excluded by the trial judge and that the cause should thus be remanded for a new trial.

Edlin v. *Firemen's Ins. Co.*, 225 F. 2d 80, cert. den. 350 U. S. 902.

On January 20, 1953, an order was entered in the condemnation suit fixing the value of the real property as of September 3, 1952, at $43,500. The Authority immediately caused this amount to be paid to the Edlins and said amount was accepted by them.

The instant action is brought by the Edlins on the building policies, to recover the full amount of the policies, namely, $24,000. The Edlins allege that, in spite of the condemnation award which fully compensated them for the actual cash value of the property, as it existed at the time of the fire, they incurred a loss by fire and are therefore entitled to recover under their fire insurance policies.

The insurers in the instant action allege that the Edlins sustained no pecuniary loss or damage as a result of the destruction of their buildings because of the condemnation proceeding and the payment to them of $43,500 by the Authority. The insurers submit that any amount in excess of this sum would result in a windfall profit to the Edlins and would render the policies of insurance nothing more than wagering contracts.

On July 1, 1954, after its payment to the Edlins, the Authority intervened in the instant action, seeking a determination that the insurance proceeds claimed by the Edlins be held for its use. This claim was resisted by the Edlins.

On October 7, 1957, the insurers moved for judgment on the pleadings upon the ground that the Edlins, "having sustained no pecuniary loss by reason of the fire," are not entitled to recover under the policies of insurance sued upon. The District Court sustained the motion of the insurers. 160 F. Supp. 487. The ruling of the court was based upon the decisional law of the State of Illinois. *Beman* v. *Springfield Fire & Marine Ins. Co.*, 303 Ill. App. 554, 25 N. E. 2d 603; *Schultz for the Use of Whitlock* v. *Home Ins.*

Co., 205 Ill. App. 297; *Patterson* v. *Durand Mut. Fire Ins. Co.*, 303 Ill. App. 128, 24 N. E. 2d 70. See also *Illinois Mut. Fire Ins. Co. v. The Andes Ins. Co.*, 67 Ill. 362, not cited to the District Court. The District Court also denied the claim of the Authority, holding that it was not a party to the contracts of insurance sued upon and thus, under the law of Illinois, was not entitled to recover thereunder.

Thereafter, this cause was separately appealed by the Edlins and the Authority to the United States Court of Appeals for the Seventh Circuit, the Edlins contending that they did suffer a loss under the policies of insurance and the Authority contending that it is entitled, under the doctrine of equitable subrogation, to those proceeds inuring to the benefit of the Edlins so that the Authority might be reimbursed for the money which it was required to pay under the condemnation proceeding for the building as it stood prior to the fire.

On June 4, 1959, the Court of Appeals reversed the judgment of the trial court insofar as said judgment denied the claim of the Edlins against the insurance companies and held, in reliance upon the case of *First National Bank of Highland Park* v. *Boston Ins. Co.*, 17 Ill. 2d 147, 160 N. E. 2d 802, decided May 22, 1959, that the Edlins were entitled to recover under said policies.* The Court of Appeals affirmed the judgment of the trial court insofar as it denied any and all claim of the Authority to the proceeds of the policies.

REASONS FOR GRANTING THE WRIT.

The writ herein prayed for should be granted as the decision of the Court of Appeals decides an important state question in a way in conflict with state law. Further, in

* Although *First National Bank* was decided subsequent to the decision of the District Court, and in fact, subsequent to oral argument in the Court of Appeals in the case at bar, the Court of Appeals did not grant to counsel an opportunity to express their views on the relationship of the opinion of the Supreme Court of Illinois to the case at bar.

reversing the decision rendered in the District Court for the Southern District of Illinois, the Court of Appeals for the Seventh Circuit is in conflict with the Court of Appeals for the Eighth Circuit as regards the scope of review to be afforded by a Court of Appeals in reviewing a decision of a District Court rendered in a case involving diversity of citizenship. Thirdly, the Court of Appeals, in basing its opinion upon a case decided subsequent to the decision rendered in the District Court, has misunderstood the rule of *Vandenbark* v. *Owens-Illinois Glass Co.*, 311 U. S. 538, 85 L. Ed. 327, and cases subsequent thereto. The action of the Court of Appeals renders it necessary for this Court to clarify the application of the principle of the *Vandenbark* case.

1. The insurers contend that under the decisional law of Illinois an insurance policy is a contract of indemnity and that an insured thereunder is not entitled to profit thereon. The insurers further contend that the Court of Appeals has misconstrued the law of Illinois in holding that the doctrine of indemnity does not apply there. The instant decision is thus in conflict with the applicable state law.

The net of the instant case is that the Edlins, having recovered in full the actual cash value of their property at the date of the fire from the Authority, here seek double recovery for the same claim by virtue of the fire and the fire insurance policies. The District Court correctly held that the Edlins had suffered no financial or pecuniary loss by reason of fire. As the Court stated in its opinion in 160 F. Supp. 487, at page 489:

> "In the instant case the court looks to the substance of the whole transaction rather than to seek a metaphysical hypothesis on which to justify a loss that is no loss. This court is not convinced that the plaintiffs herein have had any actual loss."

The Edlins, in contending that they were entitled to recover on their policies of insurance, relied upon certain cases decided by the courts of New York, Massachusetts, Michigan and Pennsylvania, namely, *Heidisch v. Globe & Republic Ins. Co.*, 368 Pa. 602, 84 A. 2d 566, and *Dubin Paper Co. v. Insurance Co. of North America*, 361 Pa. 68, 63 A. 2d 85. They relied on no cases decided by the courts of Illinois. The insurers, petitioners here, contended that the rule of law followed in Illinois differed from that enunciated by the Pennsylvania decisions. If there were no pecuniary loss, there could be no recovery. The insurers relied primarily on the case of *Beman v. Springfield Fire & Marine Ins. Co.*, 303 Ill. App. 554, 25 N. E. 2d 603. Reliance was also placed upon *Schultz for the Use of Whitlock v. Home Ins. Co.*, 205 Ill. App. 297, and *Patterson v. Durand Mutual Fire Ins. Co.*, 303 Ill. App. 128, 24 N. E. 2d 740. (The principle of those cases was enunciated and discussed in the earlier case of *Illinois Mutual Fire Ins. Co. v. The Andes Ins. Co.*, 67 Ill. 62. This case was not cited to the District Court.)

In *Beman* the plaintiffs held an option to repurchase certain premises which were then owned by a former mortgagee. While the option to repurchase was in full force and effect, and while the plaintiffs' interest in said premises by way of said option to repurchase had a value in excess of $2500, the fair cash market value of said premises being more than $2500 in excess of what plaintiffs would have had to pay to repurchase the same, a policy of insurance was issued by defendant to plaintiffs. Subsequently the dwelling insured was damaged by fire in an amount in excess of $2500. The record owner repaired the premises and was reimbursed for the cost thereof by its own insurance companies, which companies covered only the owner's interest and were in no wise in privity with plaintiffs. Shortly thereafter the plaintiffs procured a buyer for said premises and exercised their option to repurchase the same,

so that the sale could be made. At the time of repurchase the repairs necessitated by the fire damage had been completed without cost or expense to the plaintiffs and the plaintiffs received from their buyer as much for their option interest as they would have received had the fire never occurred. Plaintiffs nevertheless claimed to be entitled to recover from defendant, their insurer, the face amount of the policy because the amount of fire damage to said property exceeded that sum. Defendant denied liability on the ground that plaintiffs suffered no pecuniary loss by reason of said fire or said fire damage. Plaintiff in the *Beman* case argued that a policy of insurance provides for payment of a certain sum upon the occurrence of an event such as a fire and that when the property has been damaged liability is fastened on an insurer under its policy and cannot be extinguished or reduced by the act of any third person. Defendant's theory was that an insurance contract is a contract of indemnity and that an insured is not entitled to recover if he suffers no pecuniary loss. The Court held, in a unanimous opinion, that a contract of insurance is one of indemnity, and that there can be no recovery thereunder if there is no loss to the person insured. The case is important because the Appellate Court gave full consideration to conflicting decisions in other jurisdictions on the point at issue and chose to follow the indemnity rule, based on its approval of the earlier decision of the same court in *Schultz for use of Whitlock* v. *Home Insurance Company*, 205 Ill. App. 297, and of cases from other jurisdictions following the same view, and particularly *Ramsdell* v. *Insurance Company of No. America*, 197 Wis. 136, 221 N. W. 654. In summary the Court held (1) that the contract was one of indemnity and (2) plaintiff had sustained no pecuniary loss. The Court therefore reversed the judgment of the trial court which had entered for the insured.

To the same effect is *Schultz for use of Whitlock* v. *Home*

Insurance Company, 205 Ill. App. 297. There it appeared that Schultz had contracted with a contractor for the construction of a building on a lot owned by Schultz. To protect himself against loss by fire during the construction, the contractor obtained a policy of insurance in his own name covering the building. The owner obtained a policy of insurance with the same company. The building was damaged by fire when nearly completed but prior to delivery. The contractor settled its loss with its company. At the same time the owner assigned to Whitlock any claim which he might have against his insurer for loss by fire. The contractor proceeded to complete the building and repaired the damages. When the building was completed it was turned over to the owner and accepted by him and the full contract price was paid to the contractor. Plaintiff, the assignee of the owner, then sued upon the policy and was successful in recovering a judgment in the trial court for the amount of damage resulting from the fire. In reversing, the Appellate Court stated:

> "By the terms of its policy the defendant contracted to compensate Schultz for any loss or damage by fire. Is he entitled to compensation when he has suffered no loss or damage? We are of the opinion that he is not. The contract of insurance against loss by fire is a contract of indemnity; it is to make good for loss, to compensate for damages. * * *
>
> "To allow this judgment to stand is to give plaintiff a clear profit to that amount; for $3200 he would get not only an equivalent of this amount in the value of the building, but also $798.50. If this should be deducted from the contract price of $3200, the plaintiff would get a $3200 house for $2401.50. The insurance policy was not intended as a policy of profit to the insured; this is contrary to its genius and purpose * * *.
>
> "Plaintiff having suffered no loss or damage is not entitled to recover on the policy issued by the defendant; hence the judgment is reversed * * *."

The District Court, in considering the opposing contentions therein made by the Edlins and the insurers, stated in its opinion in 160 F. Supp at p. 489:

> "It is the opinion of this Court that Illinois does not follow the New York rule but follows a rule that a contract of fire insurance is a contract of indemnity against such loss or damage as the insured may sustain by reason of the destruction of the property described in the policy and that where no financial or pecuniary loss has been sustained by virtue of such destruction there can be no recovery. (Citing: *Beman* v. *Springfield Fire and Marine Insurance Company*, 303 Ill. A. 554; *Schultz for the Use of Whitlock* v. *Home Insurance Company*, 205 Ill. A. 297; *Patterson* v. *Durand Mutual Fire Insurance Company*, 303 Ill. A. 128.)
>
> "This Court has carefully examined the *Beman* case and is impressed with the clarity of said opinion."

Subsequent to the opinion of the District Court in the instant case the Appellate Court of Illinois for the First District rendered an opinion in the case of *First National Bank of Highland Park* v. *Boston Ins. Co.*, 17 Ill. App. 2d 159, 149 N. E. 2d 420. In that case defendant insurance companies had issued policies of insurance to the title holder of real property. Subsequent to the issuance of the policies the title holder entered into a contract to sell the property for a given price. A portion of the purchase price was paid by the vendee to the vendor; the remainder was to be paid at a scheduled closing date. The form contract for the sale of land provided that insurance premiums were to be pro-rated as of the date of the delivery of the deed and that the insurance policies were then to be assigned to the buyers. A typewritten rider to the contract further provided:

> "If, prior to delivery of deed hereunder, the improvements on said premises shall be destroyed or materially damaged by fire or other casualty, this contract shall at the option of the buyer, become null and void."

Prior to the closing date the property was destroyed by fire. Claim was made by the vendor upon its policies of insurance. The insurers contended that they were liable to the insured only to the extent of the balance due on the purchase price. It was expressly stipulated at the trial of the cause that the actual cash value of the destroyed property at the date of loss was in excess of both the purchase price and the policies of insurance and that the contract of sale had not been consummated subsequent to the fire. The Appellate Court of Illinois held that the insurers were liable for the full amount of their policies. The court, in finding against the insurers, relied for its opinion upon *Dubin Paper Co.* v. *Insurance Company of North America*, 361 Pa. 68, 63 A. 2d 85, and *Milwaukee Mechanics Ins. Co.* v. *Maples*, 37 Ala. App. 74, 66 So. 2d 159 cert. den. 259 Ala. 189, 66 So. 2d 173, which in turn had relied upon *Heidisch* v. *Globe & Republic Ins. Co.*, 368 Pa. 602, 84 A. 2d 566. This latter case had been the principal case relied upon by the Edlins in the case at bar.

The Supreme Court of Illinois granted leave to the insurers to appeal from the decision of the Appellate Court. Although the Supreme Court of Illinois affirmed the result reached by the trial and appellate courts, it is most evident from the opinion that the reasoning of the lower courts was not adopted, that the decision of the Illinois Supreme Court was specifically and strictly limited to the facts in the case before it, and that those prior Illinois decisions which established the rule of indemnity for which the insurers contend here and upon which the District Court relied remained in full force and effect and were neither criticized nor overruled. It is further clear from the opinion that the Pennsylvania decisions were not imported into the law of Illinois either by express acceptance or by implied recognition of their validity. The Supreme Court of Illinois stated in 17 Ill. 2d 147 at pages 150, 152, 154, 160 N. E. 2d 802 at pages 804, 805, 806:

"The problem that the case presents is not an easy one. When insured property is in a single ownership, it is not hard to hold to the orthodox concept of an insurance contract as a personal contract of indemnity. But there are inherent difficulties when there are multiple interests in the property. Those inherent difficulties are augmented because the effect given to an executory contract to sell realty, and to the doctrine of equitable conversion, differs significantly from one jurisdiction to another. The result is that neither courts nor commentators are agreed upon proper solutions for the many variations on the vendor-vendee-insurer theme. See, *e. g. Dubin Paper Co.* v. *Insurance Co. of North America*, 361 Pa. 68, 63 A. 2d 85; *Wohlt* v. *Farmers' Home, Hail, Tornado & Cyclone Ins. Co.*, 206 Wis. 35, 238 N. W. 809; Vance on Insurance (3rd ed. by Anderson), sec. 131; Goble, 'The Moral Hazard Clauses of the Standard Fire Policy,' 37 Col. L. Rev. 410 (1937); Godfrey, 'Some Limited Interest Problems,' 15 Law & Cont. Problems 415 (1950); Vanneman, 'Risk of Loss in Equity,' 8 Minn. L. R. 127 (1923)."

* * * * *

"We hold, * * * that the contract price did not conclusively determine the value of the vendor's interest *for the purpose of determining* the amount due upon the insurance policies."

* * * * *

"* * * if it was intended to mean that recovery should be limited by the price fixed in an executory contract for the sale of the property, it would have been easy to say so."

* * * * *

"The position of the insured appears to have been taken in reliance upon *Büdelman* v. *American Insurance Co.*, 297 Ill. 222. It is apparent from the record that even if the insurers were not formally apprised of it, they had reasonable grounds for inferring it. During the initial negotiations the insured's original attorney withdrew 'in the light of the contract to pur-

chase the property,' and allowed the attorney for the purchasers to pursue the claim. That attorney has since represented the insured. In this we see no prejudice to the insurers. The contract of sale gave the buyers the option to cancel the contract if the building was destroyed or materially damaged by fire. That contingency occurred, and we do not see how the way in which the contracting parties have dealt with the resulting situation can be a matter of concern to the insurers."

It is interesting to note the Supreme Court of Illinois' stress upon the peculiar provision of the contract of sale between the vendor and vendee. Further, it is interesting to note the express language of the court limiting its opinion to the facts before it, to-wit, an executory contract for the sale of land, which contract was not consummated at the time of the fire and which contract squarely placed the risk of loss upon the insured seller. The Supreme Court of Illinois refused to follow the Pennsylvania decisions; although it is clear from the opinion of the intermediate appellate court of Illinois and the briefs filed in the Supreme Court of Illinois that said decisions were considered.

The decision of the District Court in the *Edlin* case was brought to the attention of the Supreme Court of Illinois by the insurers. It was argued by the insured that neither the *Edlin* case nor those cases upon which it was based, *Beman* v. *Springfield Fire & Marine Ins. Co.*, 303 Ill. App. 554, *Schultz for the Use of Whitlock* v. *Home Ins. Co.*, 205 Ill. App. 297, or *Patterson* v. *Durand Mut. Fire Ins. Co.*, 303 Ill. App. 128, were relevant or material to the decision in the *First National Bank* case. The Supreme Court of Illinois did not comment upon the *Edlin* case, nor did it refer to the prior Illinois precedents, including *Illinois Mutual Fire Ins. Co.* v. *Andes Ins. Co.*, 67 Ill. 362 which established and applied the rule of indemnity and upon

which the District Judge herein relied in granting the motion of the insured for judgment on the pleadings. The *First National Bank* case did not abrogate the doctrine of indemnity nor overrule or disapprove of the cases upon which it is based and upon which the District Court relied. The *First National Bank* case was thus not a binding precedent under the rule of conformity, but was expressly limited to cases involving the doctrine of equitable conversion. Thus the finding of the trial court on the question of Illinois law was not only a permissive one but a correct one, even in the light of the subsequent *First National Bank* decision.

The *First National Bank* case has already caused comment in the legal journals published within the State of Illinois. In "Equitable Conversion in Illinois" by Milton M. Hermann, appearing in the June 1959 edition of the Chicago Bar Record, at page 401, the case is discussed in the light of the prior Illinois decisions dealing with the doctrine of equitable conversion. The doctrine of equitable conversion and its application in Illinois was a key point at issue in the *First National Bank* case. This is shown by the reliance of the Supreme Court of Illinois on its earlier opinion in *Budelman* v. *American Insurance Co.*, 297 Ill. 222, 130 N. E. 513. This case was the key to the decision in *First National Bank*. It is totally irrelevant to Edlin, as is most aptly demonstrated by the fact that neither Edlin nor the Authority cited it to either the District Court or Court of Appeals at any time during the pendency of this litigation. The doctrine of equitable conversion is far removed from the question under consideration in the case at bar. So likewise are both *Budelman* and *First National Bank*.

If the case at bar bears any resemblance to any Illinois decision, it is clear that that decision is *Beman*. There as here the insured was reimbursed in full for the value of its premises damaged by fire by a source other than the in-

surer. This was not the case in *First National Bank of Highland Park*, where it was expressly admitted that the premises upon which the insured bore the risk of loss had a value far in excess of the amount which it was entitled to recover either under the contract of sale or the insurance policies. It was clearly recognized in *Beman* that payment to the insured would result in nothing more than a profit. Recovery was thus denied. Recovery should have been denied in the case at bar.

If the Supreme Court of Illinois had wished to criticize or overturn the precedents upon which the decision of the District Court in this case was based, it would have done so in express terms. Those cases were before the Supreme Court of Illinois. Instead, it considered them inapposite to its decision in *First National Bank*. That case should have been considered inapposite here.

The *First National Bank* case not only is not a proper precedent here but its use by the Court of Appeals for the Seventh Circuit in this protracted *Edlin* litigation is most unconscionable when this case is examined in conjunction with the first *Edlin* case. In that case, brought upon the contents policies, the insurers attempted to offer evidence relating to the motive of the insured. This offer of evidence was predicated on the authority of *Milhim* v. *Hawkeye-Ins. Co.*, 171 Ill. App. 262. There the insurers defended a claim on policies of fire insurance for the reason that the insured had conspired to cause the fire which damaged the property. In the *Milhim* case the Appellate Court of Illinois said (171 Ill. App. 262, 267):

> "* * * Any and all evidence which to the slightest degree tended to prove a conspiracy as charged was competent and should have been admitted."

The Court of Appeals for the Seventh Circuit, by a divided court, affirmed the refusal of the trial judge to admit the evidence, the Court stating in 225 F. 2d at page 82:

"• • • it is well settled in Illinois, by her Supreme Court, that: 'A judicial opinion must be read as applicable only to the facts involved and is authority for what is actually decided in the case [citing] and not for other questions to which the language has no application.'. *People ex rel. Fisher* v. *Baltimore & O. R. Co.*, 1945, 390 Ill. 389, 393, 61 N. E. 2d 382, 384, accord *Village of Lombard* v. *Illinois Bell Telephone Co.*, 1950, 405 Ill. 209, 219, 90 N. E. 2d 105. Speaking for a unanimous court in *Armour & Co.* v. *Wantock*, 1944, 323 U. S. 126, 132-133, 65 S. Ct. 165, 168, 89 L. Ed. 118, Mr. Justice Jackson reiterated the same principle pervading federal courts: 'It is timely again to remind counsel that words of our opinions are to be read in the light of the facts of the case under discussion'."

The *First National Bank of Highland Park* case did not involve a condemnation proceeding. The court did not deal with the principles relevant to decision here. It must be considered inapposite to a decision in the case at bar.

2. The scope of review afforded by the Court of Appeals for the Seventh Circuit in the instant case is in conflict with the scope of review afforded by the Court of Appeals for the Eighth Circuit in diversity actions brought there.

The Court of Appeals for the Eighth Circuit has consistently held that where the law of the state in which a District Court sits is doubtful and the District Court makes a determination of said law, the question for review is not whether the conclusion of the trial court as to a question of local law is necessarily correct but whether the court reached a permissible conclusion, that is, such a conclusion as the Court of Appeals reasonably may believe that the Supreme Court of the state would or might reach were it called upon to decide the precise question decided by the trial court. *Milwaukee Insurance Company* v. *Kogen*, 8 Cir., 240 F. 2d 613, 615; *Homolla* v. *Gluck*, 8 Cir., 248 F. 2d 731, 733, 734; *Grundeen* v. *United States Fidelity & Guaranty Company*, 8 Cir., 238

F. 2d 750, 753; *Daugaard* v. *Hawkeye Security Insurance Co.*, 8 Cir., 239 F. 2d 351, 355; *Buder* v. *Becker*, 8 Cir., 185 F. 2d 311, 315.

The Court of Appeals for the Seventh Circuit, in deciding the instant case, is in conflict with the Court of Appeals for the Eighth Circuit in that it has reviewed on the merits the decision of the lower court, and, using authorities not precisely in point, seen fit to reverse the District Court's opinion when the latter court has reached a permissible conclusion based upon state law. The Court of Appeals has thus seen fit to out-predict the prediction of the District Court. This is contrary to the rule followed in the Eighth Circuit. This conflict should be resolved by this Court.

3. The Court of Appeals for the Seventh Circuit erred in relying solely upon an opinion from the state court of Illinois rendered subsequent to the decision of the District Court. This error is most pronounced as the Court of Appeals did not see fit to avail itself of the views of counsel in the case at bar on this intervening decision. The intervening decision of the Supreme Court of Illinois did not change the law. It neither expressly nor impliedly disapproved of those cases upon which the decision of the District Court was based. It did not overrule those cases. It did not destroy the doctrine of indemnity but limited its application in the peculiar circumstance of an executory contract for the sale of real property, which contract contained a provision placing the risk of loss upon the insured seller. There was no expressed or implied rejection of indemnity or of the cases upon which the indemnity theory was based. The insurers recognize that those cases subsequent to the decision in *Erie Ry. Co. v. Tompkins*, 304 U. S. 64, 82 L. Ed. 1188, 58 S. Ct. 817, hold that an appellate tribunal must rely upon intervening state court decisions in the determination of the propriety of the decision of a lower court

on review. *Vandenbark* v. *Owens-Illinois Glass Co.*, 311 U. S. 538, 85 L. Ed. 327; *Huddleston* v. *Dwyer*, 322 U. S. 232, 88 L. Ed. 1246. However, as stated in the *Vandenbark* case, in 311 U. S. at p. 541, 85 L. Ed. at 329, relying upon *U. S.* v. *The Peggy*, 1 Cranch (U. S.) 103, 110, 2 L. Ed. 49, 51:

> "It is in the general true that the province of an appellate court is only to enquire whether a judgment when rendered was erroneous or not. But if subsequent to the judgment and before the decision of the appellate court, *a law intervenes and positively changes the rule which governs*, the law must be obeyed, or its obligation denied." (Emphasis added.)

As stated in *Huddleston* v. *Dwyer*, in 322 U. S. at p. 236, 88 L. Ed. 1249:

> "• • • a judgment of a federal court ruled by state law and correctly applying that law as authoritatively declared by the state courts when the judgment was rendered, must be reversed on appellate review *if in the meantime the state courts have disapproved of their former rulings and adopted different ones.*"

The Supreme Court of Illinois has not overruled or disapproved of that line of cases which the trial court recognized as governing the decision in the case at bar. In fact, the Supreme Court of Illinois refused to follow the reasoning of the Appellate Court decision which relied upon those cases which the Edlins had contended to be precedents for their recovery against these insurers. This Court should not approve of the reliance by the Court of Appeals for the Seventh Circuit upon the intervening case of *First National Bank of Highland Park* v. *Boston Ins. Co.* That case is inapposite here, and does not warrant reversal of the decision of the trial court, which decision was based squarely upon the applicable Illinois precedents.

Clearly, the question presented on the merits of this cause is an important one. The outcome of the instant case will have an effect on condemnation proceedings, not only in Illinois but throughout the country. Settlement of the question by this Court is plainly in the public interest. The projected activities of municipal, state and federal governmental bodies in the building of highways, public housing, sanitation, recreation, and other public facilities, indicate that there will be an ever-increasing incidence of condemnation. A large portion of the projects contemplated by municipal and state authorities will be carried on in part with grants of federal funds. Condemned property frequently seems to lend itself to serious increase of hazard, both physical and moral. It is thus necessary that this Court make known its position and resolve those questions here at hand.

As we have pointed out, the Court of Appeals for the Seventh Circuit has decided this most important state question in a way in conflict with applicable state law. It is also clear that underlying the opinion herein is a basic theoretical conflict between the Seventh Circuit and the Eighth Circuit as regards the scope of review of a Court of Appeals in reviewing the decision of a District Court in a diversity case. We say that the decision of the District Court was properly based upon the law of Illinois as the law existed at that time and as it stands today and for purposes of review in the Court of Appeals, its conclusion is a permissive one. The Court of Appeals here has merely tried to out-predict or out-guess the District Court Judge. In so doing it has erroneously applied the law. Only review by this Court can correct this error.

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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JOHN P. GORMAN.
JEROME H. TORSHEN.
Counsel for Petitioners.

APPENDIX A.

IN THE UNITED STATES COURT OF APPEALS
For the Seventh Circuit.

September Term, 1958—April Session, 1959.

No. 12308
MAX EDLIN and IDA EDLIN,
Plaintiffs-Appellants,
vs.
SECURITY INSURANCE COMPANY, *et al.*, corporations,
Defendants-Appellees.

No. 12309
PEORIA HOUSING AUTHORITY,
Intervening Petitioner-Appellant,
vs.
SECURITY INSURANCE COMPANY, *et al.*, corporations,
Defendants-Appellees.

Appeals from the United States District Court for the Southern District of Illinois, Northern Division.

June 4, 1959.

Before FINNEGAN,[1] SCHNACKENBERG and HASTINGS, *Circuit Judges.*

SCHNACKENBERG, Circuit Judge. These appeals, by Max Edlin and Ida Edlin (plaintiffs below), and Peoria Hous-

1. Judge Finnegan died before this opinion was prepared.

ing Authority, a municipal corporation of Illinois (herein called the Authority), respectively, were heard together in this court. The defendants in both cases are the following insurance companies: Security Insurance Company, Philadelphia Fire and Marine Insurance Company, The Home Insurance Company, The Standard Fire Insurance Company and Milwaukee Mechanics' Insurance Company (herein referred to as insurers). In No. 12309, Max Edlin and Ida Edlin are also named as defendants.

We now state the relevant facts as they appear in the Edlins' complaint and insurers' answer.

The Edlins were on September 3, 1952 the owners of a building in Peoria, Illinois, and the real estate upon which it was located. On that date the Authority, pursuant to the Illinois law of eminent domain, filed in the county court at Peoria a petition to condemn said property, making the Edlins parties defendant thereto.

Prior to September 3, 1952, the insurers issued their respective fire insurance policies to the Edlins covering said building. On November 28, 1952, and while said policies were in effect, a fire totally destroyed said building, the loss sustained amounting to more than the aggregate sums of all of said policies.

The value of said premises was, for the purpose of the condemnation suit, determined at a trial in said county court, commencing on January 6, 1953 and culminating in an order on January 20, 1953 fixing $43,500 as the fair cash market value of said premises, at its highest and best use, as of September 3, 1952. The Authority immediately caused said amount to be paid to the Edlins, which was accepted by them.

The insurers' answer to the Edlins' complaint averred, *inter alia*, that the Edlins sustained no pecuniary loss or damage by reason of the fire, because of the condemnation

proceedings and the payment of said sum of $43,500 by the Authority to the Edlins.

On July 1, 1954, the Authority filed a complaint as intervener, seeking a determination that the insurance proceeds be held for its use.

On October 7, 1957, the insurers made a motion for judgment in their favor upon the pleadings[2] upon the ground that the Edlins, "having sustained no pecuniary loss by reason of the fire", are not entitled to recover under the policies of insurance sued upon. The district court, in its opinion, sustained this motion, 160 F. Supp. 487, and entered an order to that effect, from which order the Edlins have appealed.[3]

The substantive law of Illinois applies to this case.

The Edlins contend that they did suffer a loss under the policies issued to them by the insurers. On the other hand, the insurers take this position:

> A contract of fire insurance is a contract of indemnity and where, as in the instant case, the insured has sustained no pecuniary loss by reason of the fire, he is entitled to no recovery under the policy of insurance sued upon. The Edlins, having been paid the full value of the property in question as of a date preceding the date of fire without diminution or depreciation because of damage by fire or otherwise, sustained no pecuniary or actual loss by reason of the fire and are therefore not entitled to indemnity under the policies sued upon.

Their view, they say, is based squarely upon the doctrine of indemnity. They rely on *Illinois Mutual Fire Ins. Co. v. The Andes Insurance Co.*, 67 Ill. 362, and several Illinois Appellate Court cases, including *Beman v. Springfield Fire & Marine Ins. Co.*, 303 Ill. App. 554, 25 N. E. (2) 603.

2. See 28 U. S. C. A. rule 12 (c).

3. The Edlins also appealed from an order which had permitted the Authority to intervene.

As to the Authority, it contends that the Edlins did suffer a loss under their policies at the time the fire occurred, and that the Authority is entitled under the doctrine of equitable subrogation to the proceeds thereof to reimburse it for money which it was required to pay, under the condemnation proceedings, for the buildings as they stood before the fire.

All parties agree that the question of law involved is whether the policies "only indemnified the named insured against financial loss and that therefore the Edlins suffered no such loss, as a result of the fire, because of the later payment by Peoria Housing Authority to the Edlins of the amount so determined by virtue of the condemnation proceedings."

According to Illinois law, the value of property sought to be condemned is to be determined as of the date of the filing of the petition, without regard to any increase or decrease in the value of the property between that date and the date of trial, or the date of judgment or the date of payment. *Sanitary District of Chicago* v. *Chapin*, 226 Ill. 499, 80 N. E. 1017; *City of Chicago* v. *Farwell*, 286 Ill. 415, 121 N. E. 795; *Forest Preserve District* v. *Eckhoff*, 372 Ill. 391, 24 N. E. 2d 52; and *Eckhoff* v. *Forest Preserve District*, 377 Ill. 208, 36 N. E. 2d 245.

Therefore, for the purposes of this case, we must assume that the value of the insured property was fixed by the county court as of September 3, 1952 and that the court did not take into account any decrease in value of the property by reason of the fire of November 28, 1952. Accordingly, the insurers argue that the Edlins sustained no pecuniary loss by reason of the fire and that they are therefore not entitled under the policies to any sum for the physical damage which the property sustained.

The insurers contend that the district court was correct

in refusing to depart from the basic doctrine of indemnity and in refusing to allow recovery for an alleged loss which, in fact, was no loss to the Edlins, thus recognizing that a departure from the doctrine of indemnity would sanction a gambling contract and, therefore, would be against public policy.

In *First National Bank of Highland Park* v. *Boston Insurance Company, et al.*,[4] Ill. 2d , N. E. 2d , the insurers took a similar position. The court, at , said:

> "The position of the insurers is that a contract of insurance is a personal contract of indemnity and that in no event is an insured entitled to be paid more than his actual pecuniary loss. They point out that the public policy against wagering contracts has always dictated that casualty insurance be limited to indemnity, and they urge that fire insurance must be so limited lest the lure of profit by means of insurance should increase the hazard of arson. They rely upon the clause of the policy which limits recovery to the extent of the insured's interest, and they argue that the insurable interest of a vendor in an executory contract for the sale of realty can not exceed the balance of the unpaid purchase price. That amount, they say, would fully indemnify him; more would unjustly enrich him. The argument is based in part upon the doctrine of equitable conversion: 'When a valid, enforceable contract has been entered into for the sale of real estate, as between the vendor and vendee equity regards the vendee as the owner of the land and the vendor as the owner of the purchase money, which is personalty.' *Rhodes* v. *Meredith*, 260 Ill. 138, 143."

However, the court said that there were several defects in the position of the insurers. The court pointed out that the obligation of a contract for the sale of land is not a per-

4. Illinois Supreme Court No. 34906, May 22, 1959.

fect one and that the vendee may, or may not, be able to pay the purchase price.[5]

The court in the *First National Bank* case, discussed the meaning of the word "interest" in a clause in the policy which provided that the insured was not to be indemnified "in any event for more than the interest of the insured". Citing as the leading case in Illinois, *Buddeman v. American Insurance Co.*, 297 Ill. 222, 130 N. E. 513, the court said, at :

> "There the insured had entered into an executory contract to sell the property on installments. The insurer contended that the policy had become void prior to the fire by reason of the change in the interest of the assured that resulted from his contract to sell. • • • 'The risk of the property remains with the title and the contract is personal with the vendor, the loss or destruction of the property falling upon him as the owner. Interest, as used in the alienation clause of this policy, means legal interest, and therefore is retained by the party holding the legal title'."

In the case at bar the risk of destruction of the insured property by fire remained with the title and the contract of insurance was personal to the Edlins. Upon them the fire loss fell. At the time of the fire they, as holders of the legal title, possessed a legal interest in the property destroyed, and they became entitled to the proceeds of the policies.

We, therefore, hold that the Edlins did suffer a loss under the policies issued by the insurers, which loss amounted to more than the aggregate sums of all of said policies, and that the insurers are liable to the Edlins on their policies.

5. It should be noted that a condemnor, in Illinois, has a right to abandon its condemnation suit, if it will pay the costs, expenses, and reasonable attorneys' fees expended or incurred by the property owner. § 10, ch. 47, Ill. R. S. 1951, *Dept. of Public Works v. O'Brien*, 402 Ill. 89, 91, 83 N. E. 2d 280, 281.

This holding, however, is subject to the disposition (which we now will make) of the claim of the Authority for reimbursement for the money paid to the Edlins pursuant to the condemnation proceedings. It relies upon the doctrine of equitable subrogation which, it says, requires such payment to it "in equity and good conscience and to avoid unjust enrichment."

We cannot agree with this contention of the Authority. The right of the Edlins to recover against the insurers is contractual in its nature, based upon the policies. Those policies never became the property of the Authority. If the Authority wished to protect itself against a fire loss on the condemned premises, it might have insured whatever interest it acquired by the filing of the condemnation proceeding. Having neglected to protect itself against such a contingency, it cannot expect a court to apply the owners' fire insurance policies for the benefit of the Authority. Moreover, after the fire, the Authority had a right to abandon the proceeding, under § 10, ch. 47, R. S. Ill. 1951. This it failed to do. If it had done so, it would not be in its present situation.[6]

We hold that the Authority has no legal claim to the proceeds of the policies in this case.

For these reasons, in No. 12308, the judgment of the district court is reversed, as to the insurers, and this cause is remanded to that court for further proceedings consistent with the views herein expressed, and in No. 12309, the judgment of the district court is affirmed as to the Peoria Housing Authority, intervening petitioner.

In No. 12308, REVERSED AND REMANDED.

In No. 12309, AFFIRMED.

6. In addition, it might possibly have protected itself against the fire loss in this case by acquiring, by the exercise of the right of eminent domain, the Edlins' interest as insured in the outstanding policies issued by the insurers. See § 8, ch. 67½, R. S. Ill. 1951. Whether or not this was legally possible, at least it might have been explored by an alert condemnor.

APPENDIX B.

IN THE DISTRICT COURT OF THE UNITED STATES
For the Southern District of Illinois,
Northern Division.

Max Edlin and Ida Edlin,
Plaintiffs,
vs.
Security Insurance Company, Philadelphia Fire and Marine Insurance Company, The Home Insurance Company, The Standard Fire Insurance Company, Milwaukee, Mechanics' Insurance Company,
Defendants,
and
Peoria Housing Authority, a Municipal Corporation and Body Corporate and Politic,
Intervening Petitioner,
vs.
Security Insurance Company, Philadelphia Fire and Marine Insurance Company, The Home Insurance Company, The Standard Fire Insurance Company, Milwaukee, Mechanics' Insurance Company, Max Edlin and Ida Edlin,
Defendants.

Civil Action No. P-1495.

OPINION.

This is an action based upon policies of fire insurance

issued by the defendant insurance companies to the plaintiffs seeking a recovery of alleged damage by fire to the buildings described in the policies, said buildings being located at 600-608 North Adams Street, Peoria, Illinois. The fire occurred on November 28, 1952 and it is alleged that the resulting damage thereby exceeded the total of the face amount of defendants' policies of insurance, the total amount of insurance being in the sum of $24,000.00. Fire insurance companies are involved as defendants herein.

On September 3, 1952, prior to the date of the fire, the Peoria Housing Authority, a Municipal Corporation, and the intervening petitioner herein, filed in the County Court of Peoria County, Illinois, a petition for condemnation of the real property upon which the buildings described in defendants' policies of insurance were located. The plaintiffs herein, Max Edlin and Ida Edlin, were named as defendants in the condemnation proceeding and were duly summoned to appear in the condemnation action. This suit proceeded to trial on January 6, 1953 in the County Court of Peoria County, Illinois and on January 10, 1953 the jury returned a verdict therein in favor of the said Max Edlin and Ida Edlin in the sum of $43,500.00. Subsequent thereto and on January 20, 1953 a final order and decree was entered on this award and on the same day the award was thereupon paid to Max Edlin and Ida Edlin by the Peoria Housing Authority.

A long and well-established rule in the State of Illinois in a condemnation proceeding provides that the value of property sought to be condemned is to be determined as of the date of the filing of the petition without regard to any increase or decrease in the value of the property between that date and the date of trial or the date of judgment or the date of payment. This rule of law was invoked by the County Court of Peoria County, Illinois in the condemnation proceeding, the presiding judge in the condem-

nation proceeding having instructed the jury in this regard. Consequently, the verdict of the jury was based exclusively on evidence of the value of the property in question as of September 3, 1952, being the date of the filing of the petition, and therefore, it must be concluded that the jury did not take into account any decrease in the value of the property by reason of the fire of November 28, 1952. The question presented by the foregoing facts is whether the insured, being the plaintiffs herein and being named in the defendants' policies of insurance, has sustained a pecuniary loss by reason of the damage to the property in question by fire and if no such pecuniary loss appears whether the plaintiffs may never-the-less recover under the said policies to the extent of the damage sustained.

It is the opinion of the Court that the condemnation award, which has been paid by the Housing Authority and received by the plaintiffs, was based exclusively upon evidence of value of the property prior to the date of the fire and it is the further opinion of the Court that the plaintiffs have not sustained a pecuniary loss by reason of the fire. The Court is required to answer the further question as to whether the plaintiffs may, in spite of the fact that they have suffered no pecuniary loss, recover under said policies. There appears to be a conflict of authority in answer to the latter question. One line of authorities which for convenience may be called the "New York Rule" holds that the rights of an insurer and the insured under a fire insurance policy are established as of the time of the fire and loss and that the fact that the insured has ultimately recouped his loss from another source does not relieve the insurer of its liability. There are also cases in other states which follow the New York rule, including Massachusetts, Michigan, Pennsylvania and others. There is, however, respectable authority opposed to the New York rule.

It is the opinion of this Court that Illinois does not follow the New York rule but follows a rule that a contract of fire insurance is a contract of indemnity against such loss or damage as the insured may sustain by reason of the destruction of the property described in the policy and that where no financial or pecuniary loss has been sustained by virtue of such destruction there can be no recovery. (Citing: *Beman* v. *Springfield Fire and Marine Insurance Company*, 303 Ill. A. 554; *Schaltz for the Use of Whitlock* v. *Home Insurance Company*, 205 Ill. A. 297; *Patterson* v. *Durand Mutual Fire Insurance Company*, 303 Ill. A. 128.)

This Court has carefully examined the *Beman* case and is impressed with the clarity of said opinion. In the instant case the Court looks to the substance of the whole transaction rather than to seek a metaphysical hypothesis on which to justify a loss that is no loss. This Court is not convinced that the plaintiffs herein have had any actual loss.

In 44 Corpus Juris Secundum, Insurance, Paragraph 224, Page 933, it is said; "Fire insurance is a personal contract with insured and not a contract *in rem*, its purpose being not to insure property against fire but to insure the owner of the property against loss by fire." In 45 C.J.S. Insurance, Paragraph 915, Page 1010, it is said: "Since a contract for insurance against fire ordinarily is a contract of indemnity, as discussed in Paragraph 14, insured is entitled to receive the sum necessary to indemnify him or to be put as far as practicable in the same condition pecuniarily in which he would have been had there been no fire, that is, he may recover to the extent of his loss occasioned by the fire but no more and he cannot recover if he has sustained no loss."

In support of the last clause of the text the Illinois Appellate Court cases heretofore mentioned are cited in

support of the above doctrine. The case of *Ramsdell* v. *Insurance Company of North America*, 197 Wis. 136, is also cited.

This Court recognizes the conflict of authority upon the questions involved but feels constrained to follow what it considers to be the law of Illinois upon the subject as enunciated in the *Beman* case. In the case at bar this Court must apply the law of Illinois irrespective of which of the conflicting views the Court might think preferable. As the highest State Court of Illinois has not passed upon the question here at issue this Court is bound by the decisions of the State's intermediate Appellate Courts in the absence of persuasive evidence that the highest State Court would rule otherwise: (*West* v. *American Telephone and Telegraph Company*, 311 U. S. 223; *Ballard* v. *Citizens Gas Company of New York*, a Seventh Circuit Case, 196 F. 2d 96.) The only applicable decisions of an Illinois court that have been cited are the Appellate Court cases, including the *Beman* case which this Court believes to be the law of Illinois upon the subject involved.

This matter arises on two motions filed by the plaintiffs, one being the motion of the plaintiffs to strike from paragraph 2 of Count II of the Answer of the insurance companies, certain allegations contained in said Answer in reference to condemnation proceedings and the payment to the plaintiffs, thereunder and which portion of the Answer being based upon the theory that Edlin's suffered no pecuniary loss. The other motion is the motion of plaintiffs to dismiss Count II of the intervener's complaint on the ground that intervener suffered no loss.

In view of the Court's opinion it is ordered that the motion of plaintiffs to strike from paragraph 2 of Count II of the Answer of the insurance companies certain allegations, is hereby denied. Ruling on the second motion of plaintiffs to dismiss Count II of the intervener's complaint

is hereby reserved for future ruling. It appears to the Court that before the intervener is in a position to assert any equitable doctrine of subrogation that it must first be determined that the insurance proceeds are payable to the Edlin's and that if the Edlin's cannot recover then the Housing Authority would be in no position to assert a right by way of an equitable doctrine of subrogation. In the event the Edlin's recover then the intervener could and should have their day in court. If the Edlin's do not recover then it would appear that the Housing Authority would have nothing upon which to base a claim.

In respect to the second motion of the plaintiffs to dismiss Count II of the intervener's complaint, the record is silent on the question as to whether the Peoria Housing Authority has sustained any loss. The pleadings are also silent in this regard.

On the basis of the ruling of the Court upon the first motion, it is ordered that the parties proceed in accordance with this ruling in order that a final order may be forthcoming.

Dated this 2nd day of October, 1957.

s/ FREDERICK O. MERCER,
U. S. District Judge.